

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT ALLEN McCOY,

Plaintiff-Appellant,

v

JOANNA LYNN McCOY, a/k/a JOANNA LYNN
SMITH,

Defendant-Appellee.

UNPUBLISHED
December 9, 2004

No. 255951
Barry Circuit Court
LC No. 94-000223-DM

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted defendant's motion to change physical custody of the parties' minor child from him to defendant. We affirm. This appeal is being decided without oral argument under MCR 7.214(E).

In reviewing a child custody decision, a trial court's factual findings should be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court's discretionary rulings are reviewed for an abuse of discretion, and questions of law are reviewed for clear legal error. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003).

Plaintiff first argues that defendant failed to show proper cause or a change in circumstances in her pleadings and that the trial court erred by failing to make a threshold finding of the requisite proper cause or change in circumstances before considering the statutory best interest factors to reevaluate custody of the minor child. We disagree.

A "change of circumstances" to allow consideration of modifying a custody order requires that "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka, supra* at 513 (emphasis in original). Because the parties' minor child was only four years old when the preceding custody order was entered, school performance was obviously not a concern at that time. Defendant's assertion in her motion that their child was receiving failing grades in school constituted an allegation of a change that could have a significant effect on his well-being given the importance of academic and intellectual development to a child. Thus, plaintiff is incorrect in indicating that defendant failed to allege a

change of circumstances to warrant reexamination of which party should have custody of the child.

Plaintiff's argument regarding the trial court allegedly considering the statutory best interest factors before finding a change in circumstances seems to be based solely on the fact that, in orally explaining its rationale for granting defendant's motion for a change of custody, the court first articulated an analysis of the best interest factors and, only after doing so, stated that defendant had proven that there was a change of circumstances. It is true that the party moving for a change in custody has the burden of proving by a preponderance of the evidence that either "proper cause" or a change in circumstances exists before the trial court may conduct a review of the best interest factors. *Vodvarka, supra* at 509. But this cannot reasonably be understood as requiring a finding of legal error merely because of the order in which a trial court sets forth its analysis in resolving a motion for change of custody. Here, the trial court did not expressly state that it found clear and convincing evidence of a change in circumstances until after it set forth its analysis of the best interest factors. However, prior to discussing the best interest factors, the trial court stated that defendant had the burden to establish by clear and convincing evidence that a change in circumstances had occurred.¹ Accordingly, it is manifest that the trial court concluded that defendant had established a change in circumstances before it undertook to analyze the best interest factors. Thus, plaintiff is not entitled to relief based on this issue.

Plaintiff also argues that the trial court applied an inappropriate legal standard with regard to what constitutes a change in circumstances because it did not compare the child's academic performance to his performance in prior school years and because something more than normal life changes are required to find a change in circumstances.

First, plaintiff's argument regarding a lack of comparison with prior school years is flawed because it fails to recognize that whether a change of circumstances has occurred is determined by comparing present circumstances to those that existed at the time of the last custody order. *Vodvarka, supra* at 513. The last custody order in this case was entered when Travis was only four years old and, thus, below school age. Accordingly, his poor performance in school was a change in circumstances since the last custody order regardless of whether it was a change from his performance in prior school years.

We acknowledge that there must be evidence of "something more than the normal life changes (both good and bad) that occur during the life of a child" to find a change in circumstances. *Vodvarka, supra* at 513-514. But plaintiff does not dispute the following factual findings of the trial court regarding the child's academic performance. The child was graded "below expectations" in spelling for the last two marking periods preceding the trial court's decision to change custody to defendant. The child was graded as needing improvement in

¹ Notably, this was unduly favorable to *plaintiff* because, while defendant had to meet the clear and convincing evidence standard with regard to the ultimate decision whether to change custody of the parties' child, she was only required to establish a change of circumstances by a preponderance of the evidence. *Vodvarka, supra* at 509.

writing, mathematics, and learning habits for the three prior marking periods. The trial court also referred to homework in which the child incorrectly answered a number of simple addition problems such as “4 plus 5”. It further referred to remarks by teachers indicating that he had a habit of “daydreaming” in class, that “distractions” were a major problem, and that the child appeared to have had “a few years developing some bad habits.” This serious level of poor academic performance constituted far more than a “normal life change” and was appropriately considered by the trial court as a change in circumstances.

Plaintiff further argues that the trial court improperly changed custody of the minor child because there was no clear and convincing evidence to support this change to his established custodial environment. We disagree.

Because there was an established custodial environment with plaintiff (having had primary physical custody of the child), defendant was required to show by clear and convincing evidence that the change in custody she sought was in the child’s best interest. *Brown v Loveman*, 260 Mich App 576, 585; 680 NW2d 432 (2004). The trial court’s decision that this showing was made, i.e., that the established custodial environment should be changed, is reviewed for an abuse of discretion. *Winn v Winn*, 234 Mich App 255, 262; 593 NW2d 662 (1999), modified on other grds 459 Mich 1002; 595 NW2d 826 (1999). This abuse of discretion standard of review is “highly deferential to the trial court.” *Id.*

Defendant testified that at one point plaintiff would not let her see the child’s report card and that she had to go to the school to get a copy of it. When she did so, she saw that the child had twenty-two absences. Defendant also described plaintiff as “non-cooperative” with getting the child into a summer school program. Instead, she enrolled him into a one-month long summer school program during the time that she had summer visitation. She said that the child did not miss a day of the summer school program. From our review of the testimony presented by plaintiff at the custody trial, including his own testimony, he never indicated a specific plan to deal with the child’s poor academic performance. Accordingly, in light of the undisputed facts about the child’s academic performance and evidence that could reasonably be considered as indicating that defendant was more willing to take steps to address the problem, the trial court did not abuse its discretion by granting defendant’s motion to change physical custody of the child. Specifically, the trial court could reasonably have considered there to have been clear and convincing evidence that defendant was more willing to address the child’s academic development and, thus, that it was in his best interest to be placed in her physical custody.

Plaintiff also attaches a copy of an apparent progress report to his supplemental brief that he essentially indicates as showing that the child’s academic performance has not improved after the change of custody to defendant. However, this is not appropriately considered because a party may not expand the record on appeal. This Court’s review is limited to the record established in the trial court. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Further, a custody decision has to be reviewed in light of the evidence presented to the court at the relevant time, not based on subsequent developments.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens